



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2010/075

Judgment No.: UNDT/2014/003

Date: 15 January 2014

Original: English

Before: Judge Vinod Boolell
Registry: Nairobi
Registrar: Abena Kwakye-Berko, Acting Registrar

ONANA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
Self-represented

Counsel for the Respondent:
Steven Dietrich, ALS/OHRM

Introduction

1. The Applicant joined the International Criminal Tribunal for Rwanda (ICTR) as a French Court Reporter at the FS-4 level in April 1999.
2. On 18 November 2010, he filed an Application before the United Nations Dispute Tribunal (UNDT) challenging a decision to separate him from service.
3. On 5 April 2011, the Applicant filed another Application before the Tribunal contending that: (a) he was not accorded priority as a suitable internal 15-day candidate for the post number AR-09-OTP-INT-002, Document Control Assistant; (b) he was not fully and fairly considered for the subject post; and (c) he was not informed of the results of the selection exercise.

Procedural history

4. Following a series of extensions of appointment, the Applicant was informed on 26 June 2009 that his appointment would not be renewed beyond 30 September 2009 because some posts, including his, had been slated for abolition as part of the completion strategy of ICTR.
5. On 22 September 2009, the Applicant filed an Application with the Tribunal in Nairobi to suspend implementation of the decision not to renew his appointment. On 13 October 2009, the Tribunal ordered suspension of the decision not to renew the Applicant's appointment until his case was determined on the merits.¹
6. On 30 November 2009, the Respondent filed an interlocutory appeal against the Tribunal's decision of 13 October 2009 before the United Nations Appeals Tribunal (UNAT). On 30 March 2010, UNAT held that the Tribunal had exceeded its jurisdiction by ordering the suspension of the decision beyond the pendency of

¹ UNDT/2009/033.

management evaluation.² Consequently, the Applicant was separated from service as of 30 April 2010.

Application I

7. On 13 November 2009, the Applicant filed an Application before the UNDT challenging the non-renewal decision (Application I).

8. On 30 July 2010, the Dispute Tribunal rejected the Applicant's challenge against the non-renewal of his fixed-term appointment and dismissed his Application.³

9. On 9 November 2010, the Applicant filed an appeal before UNAT against the UNDT decision of 30 July 2010.

10. On 8 July 2011, UNAT considered the Applicant's appeal dated 9 November 2010 time-barred and therefore not receivable and dismissed it in its entirety.⁴

Application II

11. On 18 November 2010, the Applicant filed an Application before the Tribunal challenging the decision to separate him, following the issuance of Judgment No. 2010-UNAT-008 by UNAT on 30 March 2010 (Application II).⁵ The Applicant contended that the Respondent should have given him one month notice prior to his separation on 30 April 2010. Furthermore, he contended that he was not fully and fairly considered for the post AR-09-OTP-INT-002, Document Control Assistant, because he was not accorded priority consideration as a 15-day candidate in accordance with ST/AI/2006/3 (Staff selection system). Moreover, he was never informed of the selection results. Lastly, he argued that he should be reintegrated into ICTR and should be granted compensation.

² 2010-UNAT-008.

³ UNDT/2010/136.

⁴ 2011-UNAT-157.

⁵ The subject matter of this Application is being decided on in this judgment.

12. On 17 December 2010, the Respondent submitted that Application II was not receivable as the Applicant had already raised this claim in his appeal dated 09 November 2010 against the Tribunal's Judgment dated 30 July 2010.⁶ Furthermore, he also raised this claim in his request for management evaluation of 25 October 2010.

Application III

13. On 5 April 2011, the Applicant filed another Application before the Tribunal stating that: he was not accorded priority as a suitable internal 15-day candidate for the post AR-09-OTP-INT-002, Document Control Assistant; he was not fully and fairly considered for the subject post; and he was not informed of the selection exercise (Application III). Lastly, he argued that he should be reintegrated into the ICTR and should be granted compensation.⁷

14. On 6 May 2011, the Respondent replied that Application III was time-barred. Further, the Applicant was not found suitable for the posts, he was accorded full and fair consideration and he was informed of the outcome of the selection exercise. He suffered no harm as a result of being advised one month after the decision was taken. Accordingly, the Application should be rejected.

Application IV

15. On 21 July 2011, the Applicant filed another Application before the Tribunal stating that his Counsel had not transmitted to him the UNDT Judgment dated 30 July 2010 (Application IV). As a result of this failure on the part of his counsel, UNAT was unable to adjudicate the matter on the merits and consequently formed an opinion based on incomplete and an inaccurate knowledge of the dispute.

⁶ UNDT/2010/136

⁷ This Application III is the second present subject matter.

16. On 30 November 2011, the Tribunal in its Judgment No. UNDT/2011/204 rejected Application IV in its entirety holding that the Applicant's case was completely devoid of merit and was clearly an abuse of the process of the court.

MEU decisions

17. On 29 July 2010, the Applicant requested management evaluation of the decision concerning his separation from ICTR in which he contended that he was not given adequate notice.

18. On 12 August 2010, the Management Evaluation Unit (MEU) rejected his 29 July 2010 request on the ground that it was time-barred.

19. On 25 October 2010, the Applicant requested management evaluation of the decision not to select him for any of the three posts advertised as Document Control Assistant in the Office of the Prosecutor of the ICTR. He stated that: (a) he was not given full and fair consideration for the posts and he was not given priority consideration as a 15-day candidate; (b) the Administration delayed the finalization of the selection process until after he separated from ICTR in order to avoid selecting him for the posts; and (c) he was not notified in writing of the outcome of the selection process.

20. On 04 January 2011, MEU rendered a decision, as per the request dated 25 October 2010, stating that the Applicant had not suffered any adverse legal consequences as a result of the failure to consider his application prior to the 30-day candidates. The time taken by the Administration to inform him of the outcome of the selection process did not amount to an actionable delay occasioning an award of compensation. Furthermore, MEU stated that the decision not to select him for any of the posts should be upheld.

Considerations

21. The preliminary issue that the Tribunal has to consider in the present matter is whether Applications II and III are receivable.

Receivability of Application II

22. On 18 November 2010, the Applicant filed an Application before the Tribunal challenging the decision to separate him following the issuance of Judgment No. 2010-UNAT-008 by UNAT on 30 March 2010. The Applicant contended that the Respondent should have given him one month notice prior to his separation on 30 April 2010. Furthermore, he contended that he was not fully and fairly considered for the post AR-09-OTP-INT-002, Document Control Assistant, for which he had been interviewed because he should have been considered as a priority candidate in accordance with ST/AI/2006/3. Moreover, he was never informed of the selection results. Lastly, he argued that he should be reintegrated in ICTR and should be granted compensation.

23. According to the Respondent, Application II is not receivable because the Applicant has already raised the claim challenging the decision to separate him, which claim was rejected by the UNDT on 30 July 2010. The Respondent further argued that the issue of his non-selection is not receivable as the Applicant had raised this claim in his request for management evaluation dated 25 October 2010.

24. On 20 January 2011, the Applicant submitted a Rejoinder to the Respondent's Reply in which he stated that: (a) no claim can be submitted to the UNDT without prior submission to the management evaluation unit; (b) the one month's notice had not been respected; (c) the selection process had been irregular and (d) his right to be notified of the results had not been respected.

25. The Tribunal notes that in his appeal against the UNDT Judgment of 30 July 2010, the Applicant also canvassed the issue that the Administration should have given him one month's notice before separating him from service.

26. UNAT held that the Applicant's appeal was not receivable as it had been filed after the then 45 day period⁸ as provided for by article 7.1(c) of the UNAT Statute and dismissed it.⁹ This is what UNAT stated:

[The Applicant's] contention that he did not receive the said UNDT Judgment [30 July 2010] or any notification from the UNDT Registry does not persuade this Tribunal, since it would be senseless to rely just on a formality to ignore [his] actual knowledge of the UNDT Judgment, as early as 2 August 2010. This Tribunal is of the view that [the Applicant's] right to due process of law was not violated.

[The Applicant] was in a position to prepare and file the appeal before the expiry date or to timely request an extension of the time limit, but he did not take any of the measures at his disposal.

In light of the foregoing, we consider the appeal time-barred and find no need to examine the merits of the present case.

27. Any litigant who wishes to appeal a decision has to comply with the procedural requirements of the appellate court. One of the important requirements is the deadline within which an appeal must be filed. An appellate court will not, as a rule, consider an appeal which is not filed timely. It is only in exceptional cases that a waiver of deadlines will be considered.

28. Once an appeal is considered not to be receivable, the judgment of the first instance court becomes final and the issues that have been determined in the first instance judgment are final and cannot be raised again as a result of the well-established principle of *res judicata*. In the present matter, UNAT held that the appeal against the UNDT judgment dated 30 July 2010 challenging the non-renewal decision was time barred. Thus, the issue of non-renewal has become final and cannot be canvassed again.

⁸ The period has been extended to 60 days by General Assembly resolution 66/237.

⁹ *Onana* 2011-UNAT-157.

29. Since the Applicant canvassed the issue of the failure to give him notice prior to his separation from service at the appellate stage, the Tribunal considers that this issue is deemed to have been encompassed in the decision of UNAT that considered the appeal not receivable. That issue cannot therefore be raised again.

30. However the Applicant raises two other issues in Application II, namely his non-selection for the position of Document Control Assistant and the Respondent's failure to inform him of the results of the selection process.

31. With respect to the objection raised by the Respondent on the claim of the Applicant challenging the decision not to select him, the Tribunal finds it strange and surprising that the Respondent argues that once management evaluation of a contested administrative action is requested, an individual cannot pursue the matter before the Tribunal. This is the understanding of the Tribunal on the objection raised by the Respondent as to receivability.

32. The short answer to this rather bizarre and incongruous objection is that a request made to or a decision of MEU does not operate as an express or disguised form of *res judicata*. The principle of *res judicata* applies as a rule to judicial decisions. The Tribunal is not bound by the finding of MEU except for the limitation put on its judicial powers by having a suspension of action, which is a judicial order, lapse following a finding of MEU, which is strictly an administrative decision.

33. The Tribunal therefore holds that Application II, as it relates to the Applicant's non-selection for the Document Control Assistant post and the failure to inform him of the selection decision, is receivable.

Receivability of Application III

34. On 5 April 2011, the Applicant filed another Application before the Tribunal stating that he was not accorded priority as a suitable internal 15-day candidate for the post number AR-09-OTP-INT-002, Document Control Assistant, he was not fully

and fairly considered for the subject post and he was not informed of the selection exercise.

35. The Respondent raised the issue of receivability by contending that Application III was filed out of time. The Applicant was required to file his Application within 90 days of the due date for the response to his management evaluation request pursuant to article 8.1(d)(i)(b) of the UNDT Statute. He submitted his request for management evaluation on 25 October 2010 and the due date for the response of MEU was 8 December 2010 pursuant to staff rule 11.2(d). As such, the Application had to be filed on 8 March 2011 but was filed out of time. Therefore, the Application is not receivable.

36. According to the Applicant, his Application is receivable, for it was filed on 4 April 2011, which is 89 calendar days after the receipt of MEU's answer on 6 January 2011.

37. Pursuant to article 7.1(a) of the UNDT Rules of Procedure, applications should be submitted to the Tribunal within 90 calendar days of the applicant's receipt of the management evaluation.

38. This provision should be read together with article 8.1(d)(i)(a) of the Tribunal's Statute which, in relevant part states that, in cases where a management evaluation of the contested decision is required, an application shall be receivable if it is filed within 90 calendar days of the applicant's receipt of the response by management to his or her submission.

39. In the present matter, the Tribunal notes that the Applicant submitted his request for management evaluation on 25 October 2010. Although the due date for the response of MEU was 8 December 2010, the Applicant did not receive a response until 6 January 2011¹⁰. This is confirmed by the documentary evidence provided by the Applicant in response to Order No. 221 (NBI/2013) issued by the Tribunal on 3

¹⁰ The response was dated 4 January 2011.

October 2013. Subsequently and within the legal deadline, on 5 April 2011, he filed his Application with the UNDT, which was 90 calendar days later.

40. On the issue of computation of time for the filing of an Application when an MEU response falls outside the 45 days limit, the Tribunal has ruled that the Applicant cannot be penalized for MEU being dilatory in its obligations (*Mohammed UNDT/2013/100*).

41. In *Neault*¹¹, UNAT decided that:

[...] it is both reasonable and practical for Article 8(1) of the Statute to provide for two different dates from which the limitations period commences to run. After all, the MEU response might partially or fully resolve the staff member's concerns and give the staff member a reason to reconsider the filing of an application challenging the administrative decision. When the management evaluation is received after the deadline of 45 calendar days but *before* the expiration of 90 days for seeking judicial review, the receipt of the management evaluation will result in setting a new deadline for seeking judicial review before the UNDT. This affords the staff member an opportunity to fully consider the MEU response in deciding whether to proceed before the UNDT.

42. In the present matter, a new deadline started operating as from 6 January 2011. The Application was filed on 5 April 2011 and was therefore within the legal deadline. Application III is receivable.

Consolidation of the cases

43. The Tribunal notes that the Applicant raises the same issues in Applications II and III. Both the Statute and the Rules of Procedure of the UNDT are silent on the consolidation or joinder of cases. However, article 19 of the Rules of Procedure permits the Tribunal to make any order or give any direction for the fair and expeditious disposal of cases and article 36 empowers the Tribunal to deal with matters not expressly provided for in the Rules in furtherance of article 7 of the

¹¹ 2013-UNAT-345

Statute. In the exercise of its powers under these provisions the Tribunal considers that in the interest of justice Applications II and III should be consolidated.

44. According to the Applicant, he was not accorded priority as a suitable internal 15-day candidate for the post number AR-09-OTP-INT-002, Document Control Assistant, he was not fully and fairly considered for the subject post and he was not informed of the selection exercise. Lastly, he argued that he should be reintegrated into ICTR and should be granted compensation.

45. According to the Respondent, the Applicant was not suitable for the posts, he was accorded full and fair consideration and he was informed of the outcome of the selection exercise. He suffered no harm as a result of being advised one month after the decision was taken. Accordingly, the Application should be rejected.

46. On 30 June 2009, the vacancy announcement (VA) issued for Document Control Assistants in the Office of the Prosecutor (AR-09-OTP-INT-002) indicated that candidates would be evaluated against the following competency, amongst others: “Technology Awareness: Fully proficient computer skills and ability to use specialized software applications such as Trim and Zyfind and other information databases”.

47. The VA listed the following as required qualifications for the post: “Minimum of three years of related experience in record management and preservation and database management. Knowledge of electronic record keeping systems...”

48. In reviewing administrative decisions regarding appointments and promotions, the UNDT examines the following: (a) whether the procedure as laid down in the Staff Regulations and Rules was followed; and (b) whether the staff member was given fair and full consideration.¹²

¹² *Abassi* 2011-UNAT-110

49. The Tribunal notes that the Applicant was a 15-day candidate who would have been entitled to priority in accordance with section 7.1 of ST/AI/2006/3. The documentary evidence shows that the Applicant was not considered prior to the 30-day candidates, for he was interviewed on 26 January 2010 along with three other 30-day candidates, two of them were interviewed before him and the third one was interviewed after him on that date.

50. According to the UNDT jurisprudence, priority consideration is to be accorded to eligible lateral candidates at the 15-day mark over candidates at the 30-day mark.

In case there is a suitable candidate among these 15-day mark candidates the Administration is precluded from considering 30-day mark candidates. As such, the administrative instruction establishes a “stair-system” in which 30-day mark candidates can only be considered if no suitable candidate can be identified among the 15-day mark candidates.¹³

It is only if “no suitable candidate can be identified at this stage”, namely the stage of considering the 15-day mark candidates, that the 30-day mark candidates are to be considered.¹⁴

51. The documentary evidence shows that the Applicant was found to be unsuitable for the position because he did not meet all of the required competencies. This is what the Interview Panel concluded:

The Panel found that while [the Applicant] has long experience at the ICTR as a court reporter, he did not have knowledge of documents control required in the Vacancy Announcement (...). The candidate was not familiar with litigation tools such as zylab and textmap (...). The Panel found during the interview that his current work involves a filing process and not documents control as required (...). The Panel was unanimous that this candidate lacked the required competencies and knowledge for the job advertised and does not recommend him for this position.

¹³ *Wu* UNDT/2009/084

¹⁴ *Kasyanov* UNDT/2009/022

52. Pursuant to UNAT jurisprudence:

The Secretary-General has a broad discretion in making decisions regarding promotions and appointments. In reviewing such decisions, it is not the role of the UNDT or the Appeals Tribunal to substitute its own decision for that of the Secretary-General regarding the outcome of the selection process.¹⁵

53. On the argument that his candidacy should have been given priority consideration in accordance with the letter and spirit of the staff rules and guidelines, for the proper conduct of the staff selection process it is beyond dispute that the ultimate test lies in article 101.3 of the Charter of the Organization that reads:

The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence, and integrity. Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible.

54. Reference can also be made to what UNAT¹⁶ has ruled in this regard:

It should be emphasized that “priority consideration” cannot be interpreted as a promise or guarantee to be appointed or receive what one is considered in priority for. To hold otherwise would compromise the highest standards of efficiency, competency, and integrity required in selecting the best candidate for staff positions under article 101 of the Charter.

55. The Tribunal concludes that since the Applicant was found unsuitable for the post, the failure to consider his application for the post prior to the 30-day candidates did not vitiate the outcome of the selection process. Accordingly, the Applicant did not suffer any adverse legal consequences as a result of the failure to consider his application prior to the 30-day candidates.

¹⁵ *Abassi* 2011-UNAT-110

¹⁶ *Megerditchian* 2010-UNAT-088

56. In compliance with the “principle of preference” as part of the ICTR’s retrenchment policy for staff members whose posts have been slated for abolishment, the Applicant avers that the principle should have applied to him as mentioned in section 11.1(c) of ST/AI/2006/3. Thus, he should have been appointed to the mentioned post because his post was being abolished.

57. According to the Respondent, this article does not apply since it merely provides the Assistant Secretary-General for Human Resources Management (ASG/OHRM) with the authority to place a staff member affected by the abolition of a post in a suitable position outside the normal process. This does not vest any individual staff member with a right to appointment; the administration exercised its discretion to conduct a selection process for the post in accordance with the normal process.

58. Regarding the allegation of bias, the Applicant submitted that the other 30-day candidates were staff members’ spouses and this impacted on the outcome of the selection process. Furthermore, the completion of the selection process was delayed until after he was separated from service in order to avoid selecting him for one of the posts.

59. According to the Respondent, the other 30-day candidates had performed the functions of the mentioned post at the FS-3 level prior to the selection process of this post. Therefore, they were able to demonstrate compatibility with the requirements of this post. Furthermore, the delay in the finalization of the selection process was due to the fact that first there were 54 eligible candidates for the posts and the Central Review Board (CRB) at ICTR requested for more additional clarification on matters in respect to the selection process unrelated to the Applicant’s candidature. Second, there was a high turnover of staff in the secretariat of the CRB.

60. It is well established that:

Where an Applicant (...) alleges bias or prejudice or claims that the selection process and the implementation of decisions regarding a

particular selection exercise was tainted by procedural irregularities, it is for the Applicant to discharge the onus of proof. Allegations of bias and prejudice are easy to make and usually extremely difficult to prove because of the absence of affirmative evidence. Accordingly the Tribunal must be prepared to draw inferences from the primary facts. If the facts established do not reasonably point to the possibility of bias or prejudice that will normally be the end of the matter.¹⁷

61. In *Rolland* 2011-UNAT-122, UNAT held:

[T]hat the selection process conducted by an interview panel can be rescinded under rare circumstances. Generally speaking, when candidates have received fair consideration, discrimination and bias are absent, proper procedures have been followed, and all relevant material has been taken into consideration, the selection shall be upheld.

We also hold that there is always a presumption that official acts have been regularly performed. This is called the presumption of regularity, but it is a rebuttable presumption. If the management is able to even minimally show that the appellant's candidature was given a full and fair consideration, then the presumption of law is satisfied. Thereafter the burden of proof shifts to the appellant who must be able to show through clear and convincing evidence that she was denied a fair chance of promotion.

62. Applying the test above, the Tribunal is unable to say that the selection process was flawed or vitiated by any bias, discrimination or breach of any procedural rule. There is no evidence that the Administration did not act in accordance with the applicable rules in deciding not to select the Applicant for the posts since he did not possess the competencies required for them. Similarly, the "principle of preference" does not amount to an automatic right to be selected for another post in ICTR where a candidate does not meet the basic requirements or competencies for such a post.

63. Regarding the formal notification of the outcome of the selection process, the Tribunal notes that the Applicant submitted his Application for the position in 2009 when ST/AI/2006/3 was still in force. ST/AI/2006/3/Rev.1, in force in January 2010,

¹⁷ *Simmons* UNDT/2013/050

was abolished by ST/AI/2010/3 which entered into force on 22 April 2010 and therefore, should apply in the present matter. The selection process was finalized in July 2010 as mentioned in the MEU findings that reads:

The CRB-ICTR finalized its review and approved the interview panel's recommendation on 7 July 2010. The recommendations of the CRB were sent to the ICTR Registrar by way of memorandum dated 12 July 2010. The Registrar made the selection decision on 23 July 2010 and by way of letter dated 26 August 2010, the three selected candidates were advised of the same. At the end of September 2010, (...) [the Applicant was] verbally informed that the selection decision had been made.

64. Section 10.1 of ST/AI/2010/3 states that:

Other candidates convoked for assessments but not selected or placed on a roster shall be so informed by the hiring manager or the occupational group manager within 14 days after the selection decision is made in writing.

65. The Tribunal notes that the Registrar made the selection decision on 23 July 2010. Pursuant to section 10.1 of ST/AI/2010/3, the due date for notification to the Applicant would have been 6 August 2010. But the Applicant was verbally informed at the end of September 2010, which is much latter than what is prescribed by ST/AI/2010/3. It is obviously clear that the provision on notification was not followed in the case of the Applicant.

66. The Tribunal takes the view that in the light of the well-established principle that the Organization should strictly follow its own rules, it was up to the Respondent to justify the departure from his own rules but this has not been done. In *Rolland*¹⁸ the UNAT held that the "failure of notification of non-selection may have a serious impact on the future career development of a staff member". In the same way, the Tribunal considers that a delay in notifying an individual may, depending on the circumstances of the case, have a similar impact.

¹⁸ 2011-UNAT-122

67. Where there is a breach of the rules that is not justified or explained, a staff member should be compensated. But in the present matter, the Tribunal is faced with the UNAT decisions where it was held that an individual who feels aggrieved by an alleged delay to notify him/her of a selection exercise is not entitled to any compensation by that very fact alone. The individual must also establish that he/she suffered some form of prejudice.¹⁹

68. In reviewing the documentary evidence, the Tribunal notes that the Applicant did not establish that, even if it were proved that there was an unreasonable delay on the part of the Administration to notify him of the outcome of the selection process, such delay had any impact on him, his circumstances or his entitlements or that he suffered any harm or significant adverse consequences which would be the ground for any award of compensation.²⁰ He is therefore not entitled to any compensation on that ground.

Decision

69. In view of the foregoing, the Tribunal dismisses Applications II and III in their entirety.

(Signed)

Judge Vinod Boolell

Dated this 15th day of January 2014

Entered in the Register on this 15th day of January 2014

(Signed)

Abena Kwakye-Berko, Acting Registrar, Nairobi

¹⁹ See *Charles* 2013-UNAT-285

²⁰ See also *Sina* 2010-UNAT-094